153 US 609

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RECORD, CASE NO. 14337.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 295.

ANTHONY F. SEEBERGER, COLLECTOR OF CUSTOMS FOR THE PORT AND DISTRICT OF CHICAGO, PLAINTIFF IN ERROR,

VS.

JOHN SCHWEYER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1890.

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INDEX.

	Original.	Print.
Caption	a	1
Præcipe for summons	2	1
Bond for costs	3	2
Summons	4	2
Marshal's return	5	2
Declaration	5	2
Appearance for defendant	9	4
Plea	10	5
Stipulation waiving jury	11	5
Order taking cause under advisement	12	6
Opinion of Judge Blodgett	13	6
Judgment	17	8
Bill of exceptions	18	8
Special findings	18	8
Defendant's request refused	21	9
Judge's certificate to bill of exceptions	21	9
Clerk's certificate	22	10
Writ of error	23	10
Citation and proof of service of same	24	11

a United States circuit court, northern district of Illinois.

JOHN SCHWEYER,
vs.
ANTHONY F. SEEBERGER, COLLECTOR OF CUSTOMS for the port and district of Chicago. } Assumpsit.

Wm. G. Ewing, United States attorney, attorney for plaintiff in error.
Shuman and Defrees, attorneys for defendant in error.

1 Pleas in the circuit court of the United States of America for the northern district of Illinois held at the United States court rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, on Thursday the eighteenth day of July, in the July term of the said court, in the year of our Lord one thousand eight hundred and eighty-nine and of our Independence the one hundred and fourteenth year.

WM. H. BRADLEY, *Clerk.*

JOHN SCHWEYER,
vs.
ANTHONY F. SEEBERGER, COLLECTOR OF CUSTOMS for the port and district of Chicago. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the eighteenth day of February, 1888, came the plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a summons and also at the same time filed his bond for costs in said entitled cause, which said præcipe and bond are in the words and figures following to wit:

2 *Præcipe.*

United States circuit court, northern district of Illinois.

JOHN SCHWEYER, PLAINTIFF,
vs.
ANTHONY F. SEEBERGER, COLLECTOR OF CUSTOMS for the port and district of Chicago, defendant.

The clerk of said court will issue a summons in the above-entitled cause in a plea of trespass on the case on promises to the damage of the plaintiff in the sum of one hundred & fifty dollars, and direct the same to the marshal to execute and make it returnable to the March term of said court, A. D. 1888.

SHUMAN & DEFREES,
Plaintiff's Attorneys.

CHICAGO, *Feb'y 18th,* 1888.

(Endorsed:) Filed this 18th day of Feb'y, A. D. 1888. Wm. H. Bradley, clerk.

3 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

Circuit court March term, A. D. 1888.

JOHN SCHWEYER,
vs.
SEEBERGER, COLLECTOR, &C. } In law.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against our property for any costs taxed against plaintiff. Dated this 18th day of February, A. D. 1888.

SHUMAN & DEFREES.

(Endorsed:) Filed Feb'y 18, A. D. 1888. Wm. H. Bradley, clerk.

4 On the same day, to wit, on the eighteenth day of February, 1888, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Anthony F. Seeberger, collector of customs for the port and district of Chicago, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago in the district aforesaid, on the first Monday of March next, to answer unto John Schweyer of a plea of trespas, on the case upon promises to his damage, as is alleged, of one hundred & fifty dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this
5 18th day of February, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the 112th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Marshal's return.

I have served the within writ by reading the same to and within the presence and hearing of Anthony F. Seeberger, collector of customs for the port and district of Chicago, therein named, on the 18th day of February, 1888.

F. H. MARSH,
U. S. Marshal,
By IRA BARCHARD,
Deputy.

(Endorsed:) Filed Feb'y 23, A. D. 1888. Wm. H. Bradley, clerk.

Afterward, to wit: On the twenty-fourth day of February, 1888, came the plaintiff, by his attorneys, and filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

In the United States circuit court for the northern district of Illinois, to the March term, 1888.

John Schweyer, plaintiff in this suit (which is a suit arising under the revenue laws of the United States, and is brought to recover
6 duties claimed by the plaintiff to have been illegally exacted of him and by him paid under protest), by Shuman & Defrees, his attorneys, complains of Anthony F. Seeberger, collector of customs for the port and district of Chicago, defendant herein, who was summoned, etc., of a plea of trespass on the case on promises. For that whereas the said plaintiff heretofore, to wit: On the first day of February, in the year of our Lord one thousand eight hundred and eighty-eight, at, to wit, the northern district of Illinois, made payment to the said defendant, collector as aforesaid, of a certain large sum of money, to wit, the sum of one hundred and fifty dollars and cents, lawful money of the United States, as duties, under protest and in order to obtain possession of certain 20 barrels of whiskey, merchandise imported into the United States for him, the said plaintiff, entered for consumption at the custom-house at the port of Chicago, in the district aforesaid, under the charge and control of the said defendant, as such collector, and the said plaintiff avers that said sum of money, above specified, so paid to the said defendant as aforesaid, as duties as aforesaid, was in excess of the amount of duties authorized by the laws of the United States to be levied, collected, and paid upon the merchandise aforesaid, and was by the said defendant collector illegally demanded and exacted of and from the said plaintiff. And the
7 said plaintiff avers that within ten days after the ascertainment and liquidation of the duties upon the merchandise aforesaid, by the proper officers of the customs, he, the said plaintiff, being dissatisfied with the decision of the said collector, gave notice in writing to the said defendant as collector, setting forth therein distinctly and specifically the ground of his the said plaintiff's objection thereto, and that within thirty days after the date of the ascertainment and liquidation, as aforesaid, the plaintiff appealed to the Secretary of the Treasury of the United States.

And the said plaintiff avers that the decision of the said Secretary of the Treasury has been had on said appeal, and that this suit has been brought within ninety days after the decision of the said Secretary of the Treasury on such appeal. By means whereof, and by force of the statute of the United States in such case made and provided, the said defendant became liable to pay to the said plaintiff the sum of one hundred & fifty dollars and cents, lawful money as aforesaid, so illegally demanded of and under protest paid by the said plaintiff as aforesaid, and being so liable the said defendant afterwards, to wit, on the day and year and at the district aforesaid, in consideration thereof undertook and then and there faithfully promised the said plaintiff well and truly to pay to the said plaintiff the said sum of money when he, the said defendant, should be thereunto afterwards
8 requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year and at the place last aforesaid, became and was indebted to the said plaintiff in the further sum of one hundred & fifty dollars, like lawful money as aforesaid, for money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted the said defendant afterwards, to wit, on the day and year and at the district last aforesaid, in consideration thereof undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned whenever the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, etc.) has not paid the said several sums of money above specified, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant hath hitherto wholly neglected and refused, and still does so neglect and refuse, to the damage of the said plaintiff in the sum of one hundred and fifty dollars, and therefore the said plaintiff brings his suit, &c.

SHUMAN & DEFREES,
Plaintiff's Attorneys.

(Endorsed:) Filed Feb'y 24, 1888. Wm. H. Bradley, clerk.

9 Afterward, to wit, on the second day of March, 1888, came the defendant by his attorney and filed in said clerk's office his appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

United States circuit court, northern district of Illinois.

JOHN SCHWEYER
vs.
A. F. SEEBERGER, COLLECTOR, &c. } No. 20858. Assumpsit.

The appearance of A. F. Seeberger, col'r, &c., defendant in this cause, is hereby entered by his attorney.

W. G. EWING,
United States Attorney.

(Endorsed:) Filed M'ch 2, 1888. Wm. H. Bradley, clerk.

10 Afterward, to wit, on the twenty-second day of August, 1888, came the defendant by his attorney and filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

In the circuit court of the United States of America for the northern district of Illinois, N. Div. July Term, 1888.

A. F. SEEBERGER, COLLECTOR, &C., *ats.* JNO. SCHWEYER. } No. 20858. Assumpsit.

And the said Anthony F. Seeberger, coll., defendant, by Wm. G. Ewing (United States attorney for this district), his attorney, comes and defends, etc., when, etc., and says that he did not undertake or promise in manner and form as the said plaintiff has above thereof complained against him; and of this the said defendant puts himself upon the country, etc.

W. G. EWING,
U. S. Attorney for Defendant.

(Endorsed:) Filed Aug. 22, 1888. Wm. H. Bradley, clerk.

11 Afterward, to wit, on the 12th day of June, 1889, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

JOHN SCHWEYER *vs.* ANTHONY F. SEEBERGER, COLLECTOR, &C. } Gen. No. 20858.

It is hereby stipulated that the above-entitled cause may be submitted to the court for trial without a jury, a jury being hereby expressly waived.

SHUMAN & DEFREES,
Attorneys for Plaintiff.
W. G. EWING,
U. S. Attorney for Defendant.

(Endorsed:) Filed this 12th day of June, A. D. 1889. Wm. H. Bradley, clerk.

12 Afterward, to wit, on the fourteenth day of June, in the adjourned May term of said court, 1889, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN SCHWEYER
vs.
ANTHONY F. SEEBERGER, &c. } Assumpsit.

Now comes the parties by their attorneys and upon issue joined herein by agreement of the parties as per stipulation filed they waive the intervention of a jury and for trial put themselves upon the court, and after hearing the evidence and the arguments of the counsel the court takes the same under advisement.

13 Afterward, to wit, on the eighteenth day of July, 1889, there was filed in said clerk's office the opinion of Judge Blodgett in said entitled cause, which said opinion is in the words and figures following, to wit:

Opinion.

Circuit court N. D. Illinois.

JOHN SCHWEYER
vs.
A. F. SEEBERGER, COLLECTOR, &c.

BLODGETT, J.:

Plaintiffs imported certain merchandise into the port of Chicago, which was described in the invoice as "onyx columns, vases, and candelabras," which merchandise the collector classed as "manufactures of marble" and assessed thereon a duty of 50 per cent ad valorem, under clause 468 of Heyl's arrangement of the customs Act of March 3, 1883. Plaintiffs contended that the goods in question were dutiable at 20 per cent ad valorem, under section 2513 of said act, as "articles wholly manufactured, not otherwise provided for," and insisted that they were justified in so claiming by the decision of the Secretary of the Treasury of September 28, 1887. An appeal was taken to the Secretary of the Treasury from the classification and assessment upon the goods in question by the collector, by
14 whom the action of the collector was affirmed. The duties so assessed were paid under protest, and plaintiffs brought this suit in apt time to recover the difference between the duties so assessed and the 20 per cent which they claim should have been the duty on said goods.

It is admitted by the plaintiffs, and the proof shows, that the goods in question are not manufactures of the "onyx" which is known and spoken of as among the gems and precious stones and usually classed with agates, cornelians, and chalcedonys, but is a stalagmitic formation of lime, resembling in its chemical composition and in its structure the finer varieties of marble. It is known by those dealing in it under the name of "onyx marble," and mainly, for brevity, evidently, is often described in the cir-

culars, invoices, and advertisements of dealers in marble and similar materials as "onyx;" the word "onyx," as applicable to this material, being evidently a fanciful or arbitrary name, suggested, probably, by the peculiar veinings and colorings of the stone.

I find in the Imperial Dictionary (volume 3, p. 390) the article defined as follows: "Onyx marble, a very beautiful, translucent limestone, of stalamitic formation, discovered by the French in the province of Oran, Algeria, and first brought into notice at the London Exhibition of 1862. It is used for the manufacture of ornamental articles."

15 In volume 15 of the ninth edition of the Encyclopedia Britannica, article "marble," p. 529, this material is spoken of as follows:

"One of the most beautiful stalagmitic rocks is the so-called onyx marble of Algeria. * * * Large deposits of a very fine onyx-like marble, similar to the Algerian stone, have been worked of late years at Tecalia, about 35 miles from the city of Mexico. Among other stalagmitic marbles, mention may be made of the well-known Gibralter stone. * * * This stalagmite is much deeper in color and less translucent than the onyx marbles of Algeria and Mexico."

And in Volume 17 of the same edition of the Encyclopedia Britannica (page 777), after describing the onyx from which cameos, etc., are cut, it is said:

"While one of them was the true onyx of modern mineralogists, as described above, the other was merely a stalagmitic variety of carbonate of lime, a mineral much softer, less precious, and much more widely distributed than the chalcedonic onyx, yet resembling it in so far as it also presents a parallel-banded structure. This mineral is known as 'onyx marble.'"

The proof shows that the material from which the goods in question are manufactured is used for substantially the same purposes as the finer kinds of marble. Its chemical composition is almost identical with

16 that of the statuary marbles, and its general use is in the manufacture of mantels, table tops, clock cases, pedestals of columns, and, in fact, all varieties of ornamental articles which have been usually manufactured of the finer varieties of marble.

There is no specific provision in the customs law for a duty upon "onyx" or "onyx marble," but the proof shows that the onyx from which cameos are cut, and which is treated and considered as a gem, is classed for duty by the custom-house authorities among the "precious stones" (480 Heyl.), at a duty of 10 per cent ad valorem, and that articles similar to the goods in question, manufactured of marble, are classed as manufactures of marble not specially enumerated or provided for, etc., under clause 468 Heyl, and assessed for duty at 50 per cent ad valorem.

There being no specific duty upon "onyx marble," as such, or articles manufactured therefrom, I am very clear that the collector rightfully classed the goods in question as a manufacture of marble, and assessed them for duty at 50 per cent ad valorem, under the assimilating clause (section 2499, Rev. St.), as, if not actually marble, the material more nearly resembles marble in its composition than it does any other material, while the manufactured goods in their uses are almost identical with manufactures of marble. The issue is, therefore, found for defendant.

(Endorsed:) Filed July 18, 1889. Wm. H. Bradley, clerk.

17 On the same day, to wit, on the eighteenth day of July, in the July term of said court, 1889, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

JOHN SCHWEYER
vs.
ANTHONY F. SEEBERGER, COLLECTOR, &C. } Assumpsit.

The court, having considered and being now fully advised upon the matters herein, finds the issue for the plaintiff, and assesses his damages at sixty-one dollars and forty-seven cents, with interest thereon from time of payment, to which finding the defendant, by his attorney, now excepts.

It is thereupon considered and adjudged by the court that said plaintiff do have and recover of said defendant the said sum of sixty-one dollars and forty-seven cents, his damages, with interest thereon from time of payment, together with his costs in this behalf, amounting to twenty-three dollars and sixteen cents. And the court finds that there was probable cause for the acts done herein by said defendant, and orders that execution do not issue herein.

18 On the hearing of said cause the following exceptions were taken and were allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Defendant's bill of exceptions.

In the circuit court of the United States, in and for the northern district of Illinois, northern division.

JOHN SCHWEYER
vs.
A. F. SEEBERGER, COLLECTOR, ETC. } Gen. No. 20858.

Be it remembered that upon the trial of this cause the facts as set out in the special finding of facts by court were proven by the plaintiff, as therein set out, and were not contradicted by the defendant.

Special finding.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

JOHN SCHWEYER
vs.
ANTHONY F. SEEBERGER, COLLECTOR OF CUSTOMS. } No. 20858. Assumpsit.

Come now the parties, and this cause having been submitted to the court for trial without a jury, a jury having been expressly waived
19 by stipulation in writing filed herein, and the court, having heard the evidence and arguments of counsel, finds the facts specially as

follows: That on the 26th day of October, 1886, the plaintiff imported, via the port and district of New York, certain merchandise, and from thence transported the same to the port and district of Chicago, under the immediate transportation act, where it was duly entered for warehouse on the 11th day of December, 1886. That within a year after their arrival in Chicago, but more than a year after their arrival at the port of New York aforesaid, the plaintiffs offered to pay the duties and charges assessed against said merchandise, but the customs officers at the port of Chicago assessed an additional duty of 10% on the amount of duties and charges due thereon, under section 2970, Revised Statutes, for the reason, as they claimed, that the merchandise had not been withdrawn for consumption within one year from the date of the original importation, they claiming that the date of original importation was the date when the merchandise arrived at the port of New York aforesaid.

That the plaintiffs paid the additional duty of 10% under protest, and for the purpose of obtaining possession of said merchandise. That within ten days after the ascertainment and liquidation of the duties upon the merchandise in question, by the proper officers of the customs, the plaintiffs gave notice in writing to the collector, setting forth therein distinctly and specifically the grounds for their objection to the payment of the said additional duties assessed upon said merchandise, and within thirty days after such ascertainment and liquidation of the duties as aforesaid, the plaintiffs duly appealed therefrom to the Secretary of the Treasury.

That in such protest and appeal the plaintiffs claimed said merchandise should not be assessed said additional duty of 10% for the reason that the same were withdrawn for consumption within one year from the date of original importation, the plaintiffs claiming that said date was the date when the said merchandise were entered at the port and district of Chicago, to wit, the 11th day of December, 1886.

That the decision of the Secretary of the Treasury was had on said appeal adversely to the claim of the plaintiffs, and this suit was brought within ninety days after such decision of the Secretary of the Treasury on such appeal to recover the alledged excess of duties, said additional 10%, amounting to $61.47.

The court further finds that the merchandise was withdrawn for consumption at Chicago, Nov. 2, 1887, which said withdrawal was at the port of original importation, in accordance with the law.

And upon the foregoing facts the court finds the issues for the plaintiff and assesses the plaintiffs damages at $61.47, with interest thereon from the date of payment, and the costs of this suit.

To which finding the defendant, by his counsel, duly excepts.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed July 18, 1889. Wm. H. Bradley, clerk. And that thereupon on the said facts so set out the court held the law to be as set out in the written opinion of the court filed herein. To which said conclusion of law the defendant, by his counsel, then and there duly excepted, and asked the court to hold the law to be that the port of New York was

the port of original importation, and not the port of Chicago. But the court so refused to hold, to which conclusion of the court in so holding as aforesaid the defendant by his counsel then and there duly excepted and tendered this his bill of exceptions, and prays that the same may be sealed signed, and enrolled, and made a part of the record, and the same is done accordingly.

H. W. BLODGETT, [SEAL.]
Judge.

(Endorsed:) Filed July 18, 1889. Wm. H. Bradley, clerk.

22 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedin s had in said court in the cause wherein John Schweyer is plaintiff and Anthony F. Seeberger, collector of customs for the port and district of Chicago, is defendant, as the same appears from the records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, northern division, this eighth day of March, 1890.

[SEAL.] WM. H. BRADLEY,
Clerk.

23 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between John Schweyer and Anthony F. Seeberger, collector of customs for the port and district of Chicago, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Anthony F. Seeberger, collector of customs for the port and district of Chicago, as by his complaint appears; and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1890, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3rd day of February, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 114th year.

[SEAL.]

WM. H. BRADLEY,
Clerk of the United States Circuit Court
for the Northern District of Illinois.

(Indorsed:) Supreme Court of the United States. Anthony F. Seeberger, collector of customs for the port and district of Chicago, plaintiff in error, vs. John Schweyer, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S. northern district of Illinois.

24 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To JOHN SCHWEYER, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein John Schweyer is plaintiff and Anthony F. Seeberger, collector of customs for the port and district of Chicago, is defendant, to show cause if any there be why the error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge, this twelfth day of February, in the year of our Lord one thousand eight hundred and ninety.

H. W. BLODGETT,
Judge.

Service accepted.

PERCY L. SHUMAN,
Atty. for Deft. in Error.

2/12/90.

(Indorsed:) 20858. Supreme Court of the United States. John Schwyer vs. Anthony Seeberger, coll'r. Citation to October term, A. D. 1890.

(Indorsed on cover:) No. 295. Anthony F. Seeberger, collector of customs for the port and district of Chicago, plaintiff in error, vs. John Schweyer. 14337. Filed October 18, 1890. N. Illinois C. C. U. S. Supreme Court U. S. Received October 18, 1890. Clerk's office.

Office Supreme Court U. S.
FILED.
MAR 8 1894
JAMES H. McKENNEY,
CLERK.

CASE No. 14337.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ANTHONY F. SEEBERGER, COLLECTOR for the district of Chicago, plaintiff in error,
v.
JOHN SCHWEYER.
No. 295.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

CASE No. 14337.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ANTHONY F. SEEBERGER, COLLECTOR for the district of Chicago, plaintiff in error,
v.
JOHN SCHWEYER.
No. 295.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover duties paid under protest in 1888 upon goods imported in 1886 and placed in bonded warehouse. The case was tried before Judge Blodgett without a jury upon written stipulation. The opinion of the court which is incorporated in the record at pages 6 and 7, is immaterial at this stage of the case, as it concerns entirely an issue found by the court in favor of the defendant. The judgment granted by the court against the

collector is based on the theory that the latter illegally exacted an additional duty of 10% under the provisions of § 2970 of the Revised Statutes.

STATEMENT OF FACTS.

The facts are specially found by the court as follows:

> That on the 26th day of October, 1886, the plaintiff imported, via the port and district of New York, certain merchandise, and from thence transported the same to the port and district of Chicago, under the Immediate Transportation Act, where it was duly entered for warehouse on the 11th day of December, 1886. That within a year after their arrival in Chicago, but more than a year after their arrival at the port of New York aforesaid, the plaintiffs offered to pay the duties and charges assessed against said merchandise, but the customs officer at the port of Chicago assessed an additional duty of 10 % on the amount of duties and charges due thereon, under section 2970, Revised Statutes, for the reason, as they claimed, that the merchandise had not been withdrawn for consumption within one year from the date of the original importation, they claiming that the date of original importation was the date when the merchandise arrived at the port of New York aforesaid.

The court further finds that the plaintiff paid the additional duty under protest, and duly appealed, etc. The last finding is as follows:

> The court further finds that the merchandise was withdrawn for consumption at Chicago, November 2, 1887, which said withdrawal was at the port of original importation, in accordance with the law.

The last clause of this finding is the court's conclusion of law from the other facts found, although contained

among the findings of fact. Stated briefly, the case is as follows: October 26, 1886, the goods arrived at New York; December 11, 1886, they were entered at Chicago; November 2, 1887, they were withdrawn for consumption at Chicago. The court concludes that Chicago was the port of importation within the meaning of the law, and hence that the goods were withdrawn within one year.

If the last clause, "which said withdrawal was at the port of original importation, in accordance with the law," were regarded as a finding of fact, it would, of course, prevent any review of the case, as the question whether or not Chicago was the port of importation within the meaning of the law is the sole question at issue. The court, however, is not bound to regard a finding as a finding of fact simply because it is so recited in the record. (*Walnut* v. *Wade*, 103 U. S., 683, 688–9.) And when the lower court sends up a finding of ultimate fact, together with further findings, showing the facts upon which this finding of ultimate fact is based, the latter is equivalent to a conclusion of law, and the matter is left open for this court to review. (*United States* v. *Clark*, 96 U. S., 37, 39, 40.)

ASSIGNMENT OF ERROR.

We assign for error the finding of the issue for plaintiff.

ARGUMENT.

This action arises under § 2970 of the Revised Statutes, which is as follows:

> Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption *within one year from the date of original*

> *importation* on payment of the duties and charges to which it may be subject by law *at the time of such withdrawal*; and after the expiration of one year *from the date of original importation*, and until the expiration of three years *from such date*, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and *an additional duty of ten per centum* of the amount of such duties and charges.

These goods were imported under the Immediate Transportation Act of June 10, 1880, ch. 190. Section 1 of that act (following § 29 of the act of July 14, 1870, ch. 255, and § 2990 of the Revised Statutes) provides:

> That when any merchandise * * * *imported at* the ports of New York * * * shall appear by the invoice or bill of lading and manifest of the *importing vessel* to be consigned to and destined for either of the ports specified in the seventh section of this act, the collector at the port of arrival shall allow the said merchandise to be shipped immediately after the entry prescribed in section 2 of this act has been made.

Section 2 provides that the merchandise shall be examined as far as necessary, but "shall not be subject to appraisement and liquidation of duties at *the port of first arrival*;" but shall be appraised "*at the port of destination.*"

Section 7 of the act of 1880 (following § 35 of the act of 1870 and § 2997 of the Revised Statutes) provides:

> That the privilege of immediate transportation shall extend to the ports of * * * Chicago * * * in Illinois, etc.

It will be noticed that the Immediate Transportation Act seems to consider the "importation" as complete at the port of first arrival; and to this effect are the later decisions of the Treasury Department (Syn. Dec. 5749, 6695, 10145), overruling the earlier decisions under the act of 1870. (Syn. Dec. 1513, 1806, 2349.) The last-mentioned decision was based on misconstruction of an opinion of Attorney-General Pierrepont (15 Op., 12–14), which was on a different question, arising in part from a peculiar provision in a different statute.

Judge Blodgett's decision upon this point was doubtless based on his own previous decision on May 26, 1885, in *Farwell* v. *Spalding* (24 Fed. Rep., 18). In that case, without rehearsing the steps by which his conclusion was reached, he announced in an oral opinion that he was satisfied from a careful examination of the legislation of Congress that the words "date of original importation" as used in § 2970, referred not to the "exterior port of first arrival," but to the "interior port of destination."

Judge Blodgett's conclusion was probably based on other passages of the Revised Statutes in relation to warehoused goods:

> § 2971: * * * any goods *remaining in public store or bonded warehouse beyond three years* shall be regarded as abandoned to the Government, and sold under such regulations as the Secretary of the Treasury may provide. * * *
>
> § 2972: The Secretary of the Treasury, in case of any sale of any merchandise *remaining in public store or bonded warehouse beyond three years*, may pay, * * *

> § 2973: If any merchandise shall *remain in public store beyond one year*, without payment of the duties and charges thereon, except as hereinbefore provided, then such merchandise, * * *

The three sections thus quoted are *in pari materia* with § 2970, and the periods of one year "in public store" and three years "in public store or bonded warehouse" in these sections seem to be identical with the periods of one year and three years "from the date of original importation" in the next immediately preceding section. This would, by a literal construction, make the date of importation identical with the date of deposit in public store at Chicago, and thus seemingly conflict with the natural intendments of the Immediate Transportation Act of 1880.

On the other hand, it can hardly be that Congress intended to allow the period for warehousing to be indefinitely extended beyond a year after actual importation; and that this would be a possible result of fixing the importation within the meaning of these provisions at the date of arrival at the interior port may be seen from the fact that, for some reason, it took these very goods a month and a half to get from New York to Chicago.

The Treasury interpretation, approved by this court in *Hartranft* v. *Oliver* (125 U. S., 525), decided April 9, 1888, solves all the difficulties. According to that view, goods in process of transportation, under charge of the customs officers, are in effect already warehoused within the meaning of the customs laws. The question arose under § 10 of the tariff act of March 3, 1883, but the court discussed the act of March 28, 1854, from which

the provisions of §§ 2970–3 of the Revised Statutes were taken. Mr. Justice Field, discussing the subject of warehoused goods, in delivering the opinion of the court, made the following remarks:

> The place in which the goods are thus kept is not the essential fact, but the custody of the Government, and the consequent exclusion of control over them by the owner, which calls for the suspension of previous duties. * * * Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody. * * * So far as the Government is concerned, they are in the same position as if technically in a public store or a bonded warehouse. * * * The act of Congress of March 28, 1854, which is now embraced in § 2971 of the Revised Statutes, in providing for the deposit of goods in public stores and bonded warehouses, declares that "any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Government;" and in the construction of this clause the Treasury Department has decided that the period limited for their remaining in a public store or a bonded warehouse includes the time on shipboard, after the time of the arrival of the ship in port. (Treasury Regulations of 1857, Art. 438.) * * * The intent of the legislature is to be followed, even if not strictly within the letter of the statute.

If the goods aboard ship in charge of custom-house officers, after entry of the vessel, are warehoused within the meaning of these acts, so also must be goods which, under like custody, are being transported between New York and Chicago.

In this connection we may call attention also to section 2967 of the Revised Statutes, showing the distinction drawn by Congress between the place of importation and the place of destination:

> Merchandise imported into the port of Louisville, and destined for Jeffersonville, may be landed and warehoused at Jeffersonville, under the custody and control of the surveyor of the port of Louisville.

This question is an important one, not only with reference to the time allowed for warehousing goods destined for interior ports, but also with reference to the duties leviable when a tariff act takes effect while the goods are *in transitu*.

It is respectfully submitted that the considerations above noted require the reversal of this judgment and direction of a judgment for plaintiff, as may be done under *Allen* v. *St. Louis Bank* (120 U. S., 20, 40).

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